

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:

PAYMENT CARD INTERCHANGE FEE : 05-MD-1720 (JG)(JO)
and MERCHANT DISCOUNT
ANTITRUST LITIGATION

: U.S. Courthouse
Brooklyn, N.Y.

January 13, 2009
1:00 p.m.

BEFORE:

HONORABLE JAMES ORENSTEIN
United States Magistrate Judge

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1 THE CLERK: Civil cause for status conference.

2 Docket number 05-MD-1720. In Re Payment Card Interchange Fee
3 and Merchant Discount Antitrust Litigation.

4 THE COURT: Hello folks. Good afternoon. Happy New
5 Year.

6 MR. DAVIDOFF: Happy New Year.

7 THE COURT: I got your passport, which was helpful
8 as always, thank you.

9 We got a couple of motions relating to the European
10 Division documents. Do you want to argue those together or
11 separately? I think they are essentially the same thing.

12 Mr. Wildfang.

13 MR. WILDFANG: Your Honor, we are happy to argue
14 them. I know the EC has asked for deferring on this. If it
15 is okay, I think, we talked to the defendants and we are happy
16 to bump it back to the next status conference so we can
17 address what the EC says or we are prepared to argue on that.

18 THE COURT: I should advise you that I received an
19 e-mail directly to my chambers today from one, Rita Wezenbeek,
20 from the European Commission. I will read it to you. I will
21 have to post a copy later on the docket. I just received it a
22 short while ago.

23 "Dear Judge Orenstein:

24 On 7 January 2010, the European Commission's
25 Directorate General for Competition received a copy of the

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1 Order issued by the Court regarding the following motions
2 filed in the case in re Payment Card Interchange Fee and
3 Merchant Discount Antitrust Litigation." And then there is a
4 summary of the motions.

5 "This Order invites the European Commission to
6 submit a letter as amicus curiae providing its views on each
7 of the pending motions to compel discovery, and to appear in
8 that capacity through counsel at the next status conference on
9 13 January 2010.

10 The Directorate General for Competition would like
11 to submit its views on the above-mentioned pending motions.
12 However, due to internal consultation procedures within the
13 European Commission we are not able to meet the deadline of 13
14 January 2010. We would therefore respectfully like to request
15 you to grant an extension of this deadline by a week (i.e.
16 until 21 January 2010.)

17 I would be grateful for confirmation of the receipt
18 of this e-mail."

19 It is signed by Rita Wezenbeek.

20 (Matter continued on the next page.)

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1 THE COURT: Okay. So that's the letter that was
2 established there.

3 I had also gotten a phone call, and I don't know if
4 it is from the same person, a law firm. It was from the same
5 person suggesting that the EC might have somebody here today.

6 Is there anybody here on behalf of the EC? That's
7 unfortunate.

8 I would just as soon hear your views, frankly. And
9 then I'll give the EC time to put something in. If anyone
10 feels the need to weigh in further, I'll hear it.

11 Mr. Wildfang.

12 MR. WILDFANG: Craig Wildfang, Your Honor, for the
13 Class Plaintiffs. And I'll be brief because I think the
14 issues are relatively straightforward. They are similar on
15 the two motions that are pending.

16 I don't think there's any dispute that the materials
17 are discoverable in the general sense. And the real question
18 is whether the objection of another party, such as the EC,
19 should trump the interest of the litigants in this proceeding.

20 There are a number of cases that address this in
21 various forums in the United States. I think there are a few
22 more cases that go in our favor. There are some cases that go
23 the other way. It's basically a comity analysis weighing the
24 interests of this proceeding versus the interest of the EC.

25 I think the best or leading case on this is In Re:

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1 Vitamins, where the Court, Chief Judge Hogan, had, actually, a
2 series of motions raising these issues and granted motions to
3 compel.

4 The Vitamins case was, I think, a more compelling
5 case for the EC in the sense that this was an international
6 cartel, there were criminal proceedings pending. Among the
7 materials that were requested and were subject to the motion
8 by the plaintiffs were leniency submissions under the EC
9 Leniency Program.

10 In this case, these are not submissions made by
11 parties seeking leniency in the EC. These are civil matters.
12 They were voluntarily made. There's not a criminal proceeding
13 pending.

14 So we think sort of a balancing of the interest of
15 the parties here weighs heavily in favor of the Class
16 Plaintiffs. Both of the things that we're seeking are in the
17 nature of summaries of evidence.

18 With respect to the statement of objections, this is
19 a set of findings by EC related to their investigation of
20 Visa. We have similar materials from their investigation of
21 Mastercard. We know that there are relevant materials in
22 there.

23 In fact, highly relevant. Many of the same issues
24 that we are addressing or will address are addressed in the EC
25 proceedings. So we think on both the summary -- the statement

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1 of objections and the oral hearing summary or transcript, the
2 balance goes in our favor.

3 If Your Honor would permit me, there is a recent
4 decision from the District of Connecticut in In Re: EPDM. In
5 which, the Court did not address the discoverability, but
6 addressed the admissibility of statements of objections.

7 THE COURT: What was that?

8 MR. WILDFANG: If I can hand up that decision?

9 THE COURT: Yes, please.

10 I was given two documents.

11 MR. WILDFANG: They're the same. Hopefully they're
12 the same.

13 This is a decision dated December 29th, 2009, in the
14 District of Connecticut. The issue the Court was addressing
15 there is whether the Court should admit, for purposes of
16 summary judgment and trial, a statement of objections made by
17 the EC, and I believe the relevant discussion is at pages 8 to
18 13 of the LexisNexis copy.

19 The Court does not address the issue of balancing of
20 comity. But, obviously, the Court had the document. The
21 question was is it admissible. So, clearly, the Court must
22 have, at sometime, determined that the matter was
23 discoverable.

24 So, Your Honor, I don't have additional comments.
25 I'm happy to answer any questions. I think, again, it boils

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1 down to a balancing of the interest of the parties. And the
2 EC, to date, in this proceeding, has not formally objected.
3 They have sent correspondence that, you know, reminded the
4 parties of their general policies. But the policies are not
5 definitive one way or another.

6 And obviously, we are interested in what position
7 they might take in this matter. But we think, even if they
8 formally object, the Court should grant our motion.

9 THE COURT: I think, for the most part, the
10 application of the five factors that the Court's used are
11 fairly simple. Could you just articulate for me your
12 understanding of the importance to the litigation of your
13 request in each of the motions.

14 MR. WILDFANG: Well, let me start with the statement
15 of objections.

16 THE COURT: And I'm sorry. Also, the final one
17 about what noncompliance would do to the interest of the
18 United States.

19 MR. WILDFANG: Well, when you say noncompliance
20 effect on the interest of the United States, in terms of this
21 proceeding or the Department of Justice investigation, which,
22 of course, is looking at some of those?

23 THE COURT: Either of those. I see that one of the
24 factors is, you know, if I don't give you what you want, what
25 interest of United States would be undermined?

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1 MR. WILDFANG: Let me answer that question first.

2 Obviously, the interests of the United States are in
3 the effective enforcement of the antitrust laws in making
4 decisions in antitrust cases based on a full factual record.

5 THE COURT: But that really falls into the first
6 factor, really.

7 MR. WILDFANG: Well, I think you have to think about
8 whether, if the party seeking the disclosure here is deprived
9 of this information, will that potentially have a material
10 effect on the ability to prosecute the claim.

11 THE COURT: Yes.

12 MR. WILDFANG: Not knowing exactly what's in the
13 statement of objections, obviously, makes it a little more
14 difficult for us.

15 THE COURT: I know. But to the extent that there
16 are five separate factors identified, I can certainly
17 contemplate scenarios where the fifth factor, about the
18 interest of the United States as such, might rise higher than
19 the effect of the litigation not getting documents.

20 I'm just wondering if you have any argument on that
21 factor, or it really is a matter of what's the importance to
22 this litigation of what you're seeking.

23 MR. WILDFANG: Well, I think it's primarily the
24 latter. But there is this fifth factor here, where we know
25 that the Department of Justice and several state's attorney

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1 general are also investigating some of the same conduct. And
2 they are getting from us what we obtained in discovery.

3 THE COURT: I take it there's -- regardless of what
4 happens here, they will have alternate ways of trying to get
5 the same items, probably more directly.

6 MR. WILDFANG: Presumably, yes.

7 THE COURT: Unless I missed something, I don't see
8 how that fifth factor applies in this case to help you any
9 more than the first factor does or doesn't.

10 MR. WILDFANG: I agree. I think it's something to
11 keep in mind. And I think, you know, the magnitude of the
12 litigation is also a factor. I think it fits into both factor
13 one and the fifth factor as well.

14 THE COURT: So tell me about the first factor.

15 MR. WILDFANG: The importance to this litigation?

16 THE COURT: Yes.

17 MR. WILDFANG: Well, again, we don't know exactly
18 what is in the statement of objections. We can infer, I
19 think, based upon what we know from public sources, and from
20 what we know about the similar investigation by the EC of
21 Mastercard, that many of the issues overlap.

22 Including issues related to the setting of the
23 default interchange fee, the use of the anti-steering
24 restraints to limit the ability of merchants to steer to more
25 competitive payment options, the IPOs of Mastercard, which we

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1 know was a major subject of the Mastercard EC proceeding.

2 So I think it's reasonable to infer that those are
3 all items that are addressed by the EC. And the findings that
4 they may have made, I think, are highly relevant to this
5 proceeding and to helping the jury understand.

6 One of the points, I think, made by the District of
7 Connecticut in admitting this document in that proceeding, is
8 that the hearsay rules permit them to be introduced because
9 there is a presumption that public officers are doing a good
10 job of obtaining evidence and evaluating that evidence.

11 And so a document like the statement of objections
12 probably has a higher evidentiary value than just putting in
13 the evidence itself as to the IPO.

14 THE COURT: On that, I assume there might be some
15 objection based on 403, Rule 403, as to such findings.

16 MR. WILDFANG: Yes.

17 THE COURT: But at a more fundamental level, my
18 experience with trying to get one fact finder's findings in
19 front of another fact finder, it typically then sort of
20 compromises the role of fact finder in the proceeding where
21 you're trying to introduce that evidence.

22 Are you suggesting that the findings themselves
23 would be admissible?

24 MR. WILDFANG: I think that's exactly what the
25 District of Connecticut decision has determined. But,

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1 obviously, that's a finding for another day.

2 THE COURT: That's true.

3 MR. WILDFANG: We think, at a minimum, since our
4 adversaries have access to this information, we should have
5 access to it. And if there's an argument that, you know,
6 their prejudicial value outweighs the probative value, and we
7 can have that argument at the appropriate time.

8 But we think, on the balancing of, you know, our
9 need for it in this case as opposed to the EC's interest,
10 which we don't think are significantly compromised by the
11 disclosure here. Obviously, there's a protective order.

12 Similar materials from the EC have been disclosed
13 without apparently doing any harm to their enforcement
14 policies. So we think, both with respect to the statement of
15 objections and the oral hearing transcript, that the balance
16 goes significantly in our direction.

17 I should note, with respect to the hearing
18 transcript, Mastercard had agreed, initially, to provide it to
19 us. So the only thing standing in the way is, you know,
20 whatever objection or interest EC has.

21 THE COURT: Well, unless I hear otherwise from your
22 adversaries, I've been assuming that it's purely an issue of
23 comity and there's no other discoverability objection. But
24 let me hear from your adversaries.

25 Mr. Powell, Mr. Merley.

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1 MR. POWELL: Your Honor, Wes Powell from Mastercard.

2 That's correct, Mastercard had agreed to produce the
3 oral recordings as long as it got consent from the EC. And
4 from Mastercard's perspective, it very clearly hadn't gotten
5 consent from the EC.

6 I understand that there's this caveat language in
7 the correspondence about whether or not it reflects a decision
8 of the commission or not. But the hearing officer assigned to
9 the matter says pretty directly that Mastercard is reminded
10 not to produce this.

11 So in terms of the question whether we feel
12 comfortable voluntarily producing it --

13 THE COURT: Well, it's not voluntarily. And perhaps
14 it's a subtle distinction, but I don't expect you to -- if you
15 voluntarily gave it, we wouldn't be here.

16 MR. POWELL: Right.

17 THE COURT: We'd be here, but not on this issue.

18 MR. POWELL: And obviously, Your Honor, if you were
19 to order it produced, Mastercard would comply with your order.
20 But having said that --

21 THE COURT: I understand. But is there an objection
22 to me doing it; or is it just merely do what you want, we just
23 don't want to get in trouble with the EC, and we'll let them
24 say what they have to say?

25 MR. POWELL: Our objection is only this, Your Honor:

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1 Which is, it is not a welcome position for Mastercard to be
2 in, to have on the one hand an order from this Court directing
3 us to produce the material, and an objection, which we take
4 seriously, from the commission or from the commission's staff
5 saying not to do it.

6 THE COURT: Right. If you were in that position,
7 I'd want you to consider it seriously. But so far you're not.
8 I mean, the letter from the EC, it says, Here's what we told
9 you before, you keep this stuff confidential.

10 But I don't see this as ambiguous. They're
11 explicitly not weighing in on what you may or may not do.
12 They're just saying, you know, we're not consenting to it.

13 MR. POWELL: Well --

14 THE COURT: I have a letter in front of me which was
15 written over a year ago. And that, in itself, suggests that,
16 if that's the last word we've heard on it, one wonders where
17 the EC has been. But as the last word, where is it saying
18 that they object to the relief that Plaintiffs seek here?

19 MR. POWELL: What I was referring to, Your Honor, is
20 the letter from the hearing officer, which --

21 THE COURT: Karen Williams.

22 MR. POWELL: Yes.

23 -- which says, "Mastercard is reminded not to
24 produce the material." The phrase that I'm referring to is --

25 THE COURT: "I remind you that Mastercard should

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1 abstain from disclosing the tapes of the hearing in the
2 discovery procedure in the U.S."

3 MR. POWELL: Exactly, Your Honor. That's what we're
4 reacting to in terms of our position on this.

5 THE COURT: Right. And then it goes on. Is there
6 some reason -- I mean, did you expect I wouldn't read the next
7 sentence?

8 MR. POWELL: About the commission not taking a
9 position?

10 THE COURT: Yeah. I mean, come on. They're saying,
11 look, you shouldn't do this. And that's voluntarily. But in
12 terms of an objection that they have a stated interest in
13 this, that's the way you put it in your letter.

14 And in fact, you put it more firmly, "Mastercard has
15 been expressly directed not to produce." So that's a little
16 stronger than, I think, the statement that we both just read.

17 But you refer to the stated interest of the EC.
18 They haven't stated anything in this.

19 MR. POWELL: Let me say, we're not sort of taking on
20 the EC's position here. The EC is going to put in their
21 position and we -- in response to Your Honor's order. We
22 really defer to them to articulate their -- the strength of
23 their objection at this stage.

24 For Mastercard it's been a question of voluntary
25 production. And if the EC is not more definitive in its

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1 position about this when it makes its submission in a week,
2 we're not sort of trying to take on a fight that the EC hasn't
3 taken on or isn't going to take on.

4 THE COURT: Right. Are you in any -- does complying
5 with an order, if I issue one to make the disclosure, does
6 that put you in any jeopardy, that you're aware of, with the
7 EC?

8 MR. POWELL: My understanding, Your Honor, from
9 Mastercard counsel in Europe, is that the commission itself
10 does not have the ability to level a penalty or fine in
11 response to this.

12 It has some ability, if it felt strongly enough, to
13 seek an injunction in the European court of general
14 jurisdiction. How likely that is, you know...

15 THE COURT: An injunction upon?

16 MR. POWELL: An injunction directed at Mastercard to
17 prevent it from producing the document.

18 THE COURT: Okay.

19 MR. POWELL: And, again, I guess we can look at what
20 the EC says in a week and judge how likely that is or not. We
21 had intended to simply report what the EC has said by way of
22 an explanation of why we've not voluntarily produced this.

23 THE COURT: One thing that today's discussion helps
24 with is you can give me some specific things to ask of the EC,
25 as long as we're going to be weighing in after we're all done

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1 here. I want to know where they've been for a year.

2 But also, what the likelihood is that there will be
3 -- that they will subject you or your codefendants to
4 conflicting legal obligations.

5 MR. POWELL: The only other thing I'll add on that,
6 Your Honor, hopefully the EC will give some explanation of
7 this in the submission. I understand from Mastercard counsel
8 in Europe that in essentially none of these proceedings, or
9 very few proceedings like this, would the commission have
10 taken a vote on the question of whether or not to object in a
11 circumstance like this.

12 So that the only objection we would get would be
13 from the hearing officer. And that's with sort of the
14 standard caveat language to make clear that it doesn't reflect
15 an actual vote of the commission having taken place.

16 THE COURT: Yes.

17 MR. POWELL: So from the DD prompt prospective,
18 their objection has the force of a commission decision. But,
19 again, I'm simply reporting what I understand their position
20 to be.

21 THE COURT: You're in the unfortunate position of
22 carrying somebody else's water, and I recognize the limits of
23 that.

24 All right. Mr. Vizas.

25 MR. VIZAS: Yes, Your Honor.

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1 I am one step removed from where Mr. Powell is. We
2 were also informed by the commission that we were not to
3 disclose this or turn it over to any one, unless we have the
4 explicit prior authorization of the commission. And, again,
5 my information is derivative from European counsel.

6 In Visa's situation, we were given a copy of the
7 statement of objections with the caveat that we weren't
8 supposed to disclose it.

9 THE COURT: Yes.

10 MR. VIZAS: This is, primarily, an action between
11 the commission, Visa Europe, which, if you remember, didn't
12 join Visa the rest of the world. So we're a step removed.
13 There's one Visa relief sought there regarding an interchange
14 rate in Europe that we don't set.

15 So in our case, I think, as far as going back to the
16 first criteria that you discussed with Mr. Wildfang, it's
17 often tenuous as to what to say as to this litigation.

18 Having said that, we're basically --

19 THE COURT: In the same boat.

20 MR. VIZAS: In the same boat, yes.

21 THE COURT: All right. Okay. Well, I'm not going
22 to rule on this -- actually, one last question for either
23 Mr. Powell or Mr. Vizas, whichever one wants to answer it.

24 I know, from my old practice in criminal law,
25 there's sort of different levels of authority when a

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1 government official can say don't disclose this, some of which
2 is -- really does have a force of law. Some of which is we'd
3 really appreciate it if you didn't, and we may think worse of
4 you if you do.

5 How would you characterize what the EC has said to
6 you thus far; not in the letters, but just initially when they
7 said, you know, This is not to be disclosed?

8 MR. POWELL: Again, having spoken with Mastercard's
9 counsel in Europe handling this, their view of this was an
10 objection that came from a very senior official in the
11 competition authority. And that it takes it -- I'm not
12 answering your question.

13 THE COURT: I think the problem we're having is I'm
14 not talking about the objection, to use that phrase, about the
15 letter.

16 The initial instruction, you know, when you're given
17 something, Don't disclose this. You know, I could tell that
18 to a grand jury witness, Please don't say this anywhere, or
19 Please don't disclose this subpoena, but I didn't have the
20 authority to say you may not.

21 Is this the sort of thing, is it the same sort of
22 thing, or is it something where they tell you not to disclose
23 it before anyone else has even requested it, you're under a
24 legal obligation not to disclose it?

25 MR. POWELL: That's my understanding, that having

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1 received the direction or the undertaking of confidentiality,
2 Mastercard is legally barred from disclosing it.

3 THE COURT: I am granting, obviously, the EC's
4 motion to weigh in later. But I'm going to ask them to answer
5 a couple of questions when they do.

6 MR. WILDFANG: Your Honor, two issues.

7 First, depending upon what the EC ends up saying, we
8 may seek leave to submit something.

9 THE COURT: Yes.

10 MR. WILDFANG: Secondly, I want the Court to know
11 that we had a brief conversation with the hearing officer some
12 months ago. We haven't had any recently. We may want to
13 contact them, unless the Court thinks that would be improper.

14 THE COURT: No. If you can all work this out,
15 great. Obviously, try to do that before the deadline for them
16 to get something in in a week.

17 MR. WILDFANG: Okay.

18 THE COURT: Okay. Old business that we may not be
19 resolving today, but the motion to compel about assertions of
20 privilege. I got the impression from your staff support you
21 didn't actually anticipate arguing it today so much as talking
22 about when and how it will be resolved.

23 MR. WILDFANG: Yes, Your Honor.

24 Craig Wildfang for Class Plaintiffs.

25 Mr. Stewart has been leading that issue for us is